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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DOMINGA NAVARRO, Plaintiff and Respondent, v. 4EARTH FARMS, INC. et al., Defendants and Appellants.	B284853 (Los Angeles County Super. Ct. No. BC606666)

APPEAL from judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Nuefeld Marks, Paul S. Marks and Yuriko M. Shikai, for Defendants and Appellants.

Matern Law Group, Matthew J. Matern, Dalia Khalili, Debra J. Tauger; Pine Tillett Pine and Norman Pine, for Plaintiff and Respondent.

Defendants and appellants 4Earth Farms (4Earth) and supervisor Ricardo Nunez appeal from a judgment following a jury trial in favor of plaintiff and respondent Dominga Navarro in this employment harassment action. On appeal, defendants contend (1) the trial court erred by admitting evidence of past emotional distress damages because Navarro stipulated to waive her claims for all emotional distress damages; (2) the trial court abused its discretion by excluding evidence of Navarro's sexual conduct with non-harassing employees; (3) there is no substantial evidence to support the finding that Nunez engaged in sexual harassment; and (4) there is no substantial evidence to support the imposition of punitive damages. We conclude that the trial court did not abuse its discretion in admitting evidence of past emotional distress because Navarro did not stipulate to abandoning those claims. The trial court properly exercised its discretion in excluding evidence of Navarro's sexual conduct with other employees, and the sexual harassment verdict and punitive damage award is supported by substantial evidence. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Allegations of the Complaint

Navarro filed a complaint against 4Earth and several individuals, including Nunez, Jamie Gutierrez, and Diana Duarte for sexual harassment and disability discrimination,

among other causes of action. She alleged that while she was employed in 4Earth's packing department between July 2013 and January 23, 2015, she was sexually harassed by supervisors Nunez and Gutierrez. She suffered damages as a result, including mental and emotional injuries.[1]

Motion for Independent Medical Examination

On February 27, 2017, 4Earth filed a motion for an independent medical examination of Navarro. Navarro opposed the motion by arguing that there was no good cause to grant the motion "because [Navarro] has agreed to enter into a stipulation satisfying [Code of Civil Procedure section] 2032.320[, subdivision] (c) and agrees to (1) make no claim for mental and emotional distress over and above that usually associated with the physical injuries claimed and (2) present no expert testimony regarding this usual mental and emotional distress at trial." Navarro also agreed to dismiss her cause of action for intentional infliction of emotional distress and not "seek future emotional/mental distress damages."

4Earth's attorney filed a declaration in reply stating that Navarro did not offer a stipulation that complied with section 2032.320 because the proposed stipulation did not follow the statute's language concerning physical injuries.

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[1] Summary judgment was entered in favor of Duarte, and the jury found Gutierrez not guilty on all causes of action.

4Earth attached an email from Navarro's counsel offering the following stipulation language: "That, with respect to her non-economic damages, Plaintiff is not making, does not make, and shall not make any claim for emotional distress over and above that which one might associate with the type of conduct claimed in this case."

At the hearing, Navarro restated the proposed stipulation that she would make no claim for emotional distress "over and above that usually associated with the injuries claimed in this case," that she would dismiss the intentional infliction of emotional distress claim and that she would not seek future emotional distress damages. In response to further inquiry, Navarro clarified she would "keep the option open of [seeking] past non-economic losses" but would not present any expert testimony on past economic distress. 4Earth argued that Navarro impermissibly attempted to broaden the stipulation to incorporate past emotional distress. Navarro stated that she intended on entering into a stipulation that complies with section 2032.320, but which permits past emotional distress damages.

After taking the matter under submission, the court denied 4Earth's motion because Navarro withdrew her claim for present or future mental distress. The court referenced *Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, for the proposition that the "mental condition of Plaintiff is not in controversy where there is no claim that Plaintiff is currently suffering mental distress."

Following the hearing, Navarro emailed defendants, stating that "[b]y citing the specific code section to you, we intended on stipulating to the language used in the statute." The email also states that Navarro "can still bring a claim for past emotional distress, which the Court notes in its ruling." Navarro dismissed her intentional infliction of emotional distress claim.

Motions in Limine

A. *Defendants' Motion in Limine*

Notwithstanding the court's prior ruling, the defendants moved in limine to preclude evidence on any matter "relating to plaintiff's mental and/or emotional distress, except to the extent the alleged distress arises out of her physical injury or injuries" because Navarro entered into a code-compliant stipulation to avoid a mental examination, which removed any claims for emotional distress. Navarro opposed the motion in limine on the ground that she did not stipulate to waiving all emotional distress damages.

The court denied the motion in limine. The court noted that defendants "misconstrue[] the offer to limit damages. . . . The court did not accept any offer by counsel to limit damages for mental and emotional distress except for current and future mental distress. The court always understood that Plaintiff was not waiving any claim of past

mental or emotional distress." "The court interpret[ed] the offers made by Plaintiff to be a conditional offer [to] withdraw claims of present and future mental and emotional distress to the extent necessary to avoid" a medical examination. "It was sufficient under *Doyle* to avoid the mental examination that the Plaintiff only withdraw claims for present and future mental and emotional distress." "[A] withdrawal of claims [for past emotional distress] would have been unnecessary to the denial of the motion compelling mental examination as claims for past mental and emotional distress are insufficient to put Plaintiff's mental and emotional condition into controversy."

B. *Navarro's Motion in Limine*

Navarro moved in limine to exclude any reference to alleged sexual or romantic relationships with a non-perpetrator. Such conduct included dating other employees, soliciting sex partners, acting suggestively at work, and intimidating female co-workers. Navarro argued that introducing evidence of her sexual or romantic relationships with anyone other than defendants would violate Code of Civil Procedure section 2017.220 and Evidence Code sections 350, 352, 783, 787, 1101, and 1106.

Defendants opposed the motion. Navarro was back in the dating world and "was not opposed to dating co-employees," so the evidence would demonstrate Navarro's own sexual conduct in the workplace.

The court granted Navarro's motion pursuant to Evidence Code section 1106, subdivision (a), which is "broadly construed and includes conduct beyond sexual activity and includes conduct that reflects a willingness to engage in sexual activity. *Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 462." The court excluded any evidence of claimed sexual conduct with persons other than the alleged harassers unless Navarro "'opens the door' as to this issue by denying behavior or calling a witness to testify on the subject of [her] past sexual activities."

Trial

Navarro testified that she began working at 4Earth in June 2013 as a food packer. Navarro's supervisors included Nunez, Gutierrez, and Duarte. Immediately after Nunez was introduced to her in 2013, he began engaging in unwanted physical contact. On several occasions, Nunez caressed and held onto Navarro's hand, which made her feel like "he was taking my clothes off." Nunez would also caress Navarro's back "from top to bottom," which made her feel dirty. Nunez caressed Navarro's back several times and was seen touching her shoulders. Navarro could not avoid Nunez in those situations because he was her supervisor.

Nunez leered at Navarro, "look[ing] me up and down as if he wanted to toss out [her work uniform] and see me naked." At times, Nunez followed Navarro to the bathroom. Navarro's attempts to dodge Nunez were unsuccessful

because "he was always there or he would switch sides" to be near Navarro. Nunez told Navarro that he liked her. He invited Navarro to go fishing, and to the beach, dinner, or dancing. At one point, Nunez said he wanted Navarro "to be with him, that he wanted me to care for him when he was an old man." Nunez text messaged Navarro that he liked her, that she was "really pretty," and that he wanted to go out with her. Navarro either declined or ignored the comments. On one occasion, Nunez text messaged Navarro a picture of Navarro's Facebook profile, and stated that he "liked to look at it in order to fall asleep." On another occasion, Nunez said if she "went out with him, [she] would have anything [she] wanted."

At the end of 2013, Navarro "reached a limit," so she told Nunez to stop because he made her feel repugnant. Following Navarro's demand, Nunez stopped touching Navarro but continued staring at her "mostly every day," including times she and her coworkers would stretch at work. Nunez was terminated in 2014.

Former employee Jacqueline Moreno left 4Earth because of the "hostile environment" created in part by Nunez. Nunez looked at other female employees, including Moreno and Navarro, "in a perverted way." Moreno felt scared from the way he looked at her. Nunez also massaged Moreno's hand and touched her back and shoulders inappropriately. Moreno saw Nunez touch Navarro in the same way. Nunez and Gutierrez referred to new female employees as "fresh meat." Another employee, Mirna Niebla,

testified that Nunez caressed her hand in a similar fashion, and she saw Nunez hold Navarro's hand. Niebla tried to avoid Nunez.

Nunez testified that he was promoted from warehouse supervisor to manager in 2014. He reported to the operations manager, but the main aspect of his job was making decisions and managing the entire 4Earth warehouse. Nunez supervised seven subordinate supervisors and approximately 100 employees. Nunez trained and disciplined employees, and reviewed the supervisors' decisions in disciplining employees. Nunez held daily meetings and initiated team-building exercises. He never sought authorization by anyone to do so, but told the operations manager after holding team-building activities.

Verenice Vega testified for the defense. She worked with Navarro until mid-2014. During cross-examination, Vega admitted that it made her "very upset" when the father of her son interacted with Navarro at work. On redirect, defense counsel asked Vega to describe the interactions between Navarro and the male employee. Navarro's counsel objected on the grounds of the motion in limine, which the trial court sustained.

Following Vega's testimony, the court and counsel discussed the court's ruling. Defense counsel sought to elicit the "details of the interaction" between Navarro and the male employee, specifically when Navarro hugged the employee to offend Vega. The court clarified that the initial questioning of Vega went only to her bias, which was

undisputed. The sought after testimony violated Evidence Code section 1106 and was inadmissible under Evidence Code section 352.

Judgment was entered for Navarro as against 4Earth and Nunez. The jury found Nunez committed sexual harassment against Navarro. Nunez also participated in quid pro quo sexual harassment. The jury also found that: Navarro was wrongfully terminated because she reported a hostile work environment. 4Earth retaliated against Navarro for reporting a physical condition affecting her ability to work, to wit a back brace, or for complaining about a hostile work environment. Navarro's work performance was not a substantial motivating reason for the decision to terminate Navarro. 4Earth failed to provide reasonable accommodations for Navarro's physical condition, but its failure was not a substantial factor in causing her harm. 4Earth failed to participate in a timely good faith interactive process with Navarro. 4Earth failed to prevent sexual harassment, discrimination, or retaliation against Navarro. 4Earth's decision to discharge Navarro was not premised on her physical condition, which precluded her cause of action for disability discrimination cause of action.

The jury awarded Navarro $9,310 in past lost earnings, and $200,000 for "[p]ast non-economic losses including mental and emotional suffering" against defendants. The jury also determined that Nunez engaged in malice, oppression, or fraud. The jury listed Nunez as an officer, director, or managing agent of 4Earth. The jury awarded

Navarro $100,000 in punitive damages against 4Earth. An amended judgment reflecting these findings was entered on January 30, 2018. Defendants filed a timely appeal.[2]

DISCUSSION

Waiver

Defendants contend Navarro waived all her claims for emotional distress damages because she entered into a stipulation that complied with Code of Civil Procedure section 2032.320, subdivision (c). Based on this stipulation, defendants contend the court erred in denying their motion in limine to exclude evidence of any emotional distress. The contentions lack merit.

A. *Standard of Review*

"A ruling by a trial court is presumed correct, and ambiguities are resolved in favor of affirmance. [Citations.] The burden of demonstrating error rests on the appellant. [Citation.]" *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631–632 (*Winograd*).

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[2] The parties separately filed requests for judicial notice of settlement agreements in a class action lawsuit that are not relevant to the instant appeal. Both requests are denied.

A stipulation is a contract and is governed by the usual rules of construction for contracts. (*Winograd*, *supra*, 68 Cal.App.4th at p. 632.) "'Under long-standing contract law, a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) Although "the intention of the parties is to be ascertained from the writing alone, if possible" (*id.,* § 1639), "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (*id.,* § 1647). "However broad may be the terms of a contract, it extends only to those things . . . which it appears that the parties intended to contract." (*Id.,* § 1648.)' (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524.)" (*Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 7–8 (*Iqbal*).)

"'The ultimate construction placed on the contract might call for different standards of review. When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract. [Citations.] When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction [following a trial] will be upheld if it is supported by substantial evidence. [Citations.]' [Citation.]" (*Iqbal*, *supra*, 10 Cal.App.5th at p. 8.) With these principles in mind, we turn to the applicable law pertaining to independent medical examinations.

B. *Statutory Scheme*

To obtain a mental examination of a party to the action, the "mental or physical condition . . . of that party" must be "in controversy in the action." (Code Civ. Proc., § 2032.020, subd. (a).) If any party desires to obtain discovery by way of a mental examination, the party must obtain leave of court on a showing of good cause. (*Id.*, §§ 2032.310, subd. (a); 2032.320, subd. (a).)

A party who wishes to avoid a mental examination may stipulate that "no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed;" and that "no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages." (Code Civ. Proc., § 2032.320, subd. (c).) "If a party stipulates as provided in subdivision (c), the court shall not order a mental examination of a person for whose personal injuries a recovery is being sought except on a showing of exceptional circumstances." (*Id.*, § 2032.320, subd. (b).)

Doyle v. Superior Court (1996) 50 Cal.App.4th 1878 (*Doyle*) clarified that a mental examination is unjustified when a party seeks only past emotional distress damages. At issue in *Doyle* was whether a court could compel an independent medical examination pursuant to former section 2032.020 when the compelled party sought past emotional distress damages rather than current or future damages.

(*Id.* at p. 1885.) The court concluded that the party's "allegation that she had suffered emotional distress in the past . . . did not place her mental condition in controversy [pursuant to former section 2032.020] and therefore did not justify the superior court's order compelling her to submit to a mental examination." (*Id.* at p. 1887.) As used in the statute, "the word 'condition' means 'state of being.' [Citation.] Logically, the statute's reference to a party's mental 'state of being' could only refer to the party's current mental state rather than mental conditions which had been experienced in the past but were no longer in existence." (*Id.* at p. 1886.) In so holding, the court noted that "'[i]n general it is unlikely that a simple sexual harassment suit will justify a mental examination.' [Citation.]" (*Id.* at p. 1886.)

C. *Analysis*

In this case, Navarro filed a stipulation agreeing to make no claim "for mental and emotional distress over and above that usually associated with the physical injuries claimed," but she also stated that she would not "seek future emotional/mental distress damages." The stipulation was consistent with the language of Code of Civil Procedure section 2032.320, which applies if Navarro sought current and future emotional distress damages.

Even if the stipulation were considered to be ambiguous, the trial court held a hearing to clarify the stipulation, and substantial evidence supports the trial

court's finding that past emotional distress damages were not waived. The interpretation of Navarro's stipulation was guided by the circumstances under which it was made (opposing the motion to compel an independent medical examination) and the matter to which it relates. The trial court reviewed conflicting extrinsic evidence set forth by the parties to construe the parties' intent. At all stages of the proceedings, Navarro indicated she would seek damages for past emotional distress. Having surmised the parties' intent and construing *Doyle*, the court denied the motion because the medical examination was unjustified. Under any standard of review, we conclude Navarro did not waive a claim for past emotional distress. Having properly construed the stipulation (*County of Sacramento v. Workers' Comp. Appeals Bd.* (2000) 77 Cal.App.4th 1114, 1121), the court did not abuse its discretion in denying the motion. (See *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 446–447; *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

Exclusion of Evidence

Defendants contend the trial court erred in excluding evidence of Navarro's sexual conduct with other 4Earth employees. We disagree.

"Evidentiary rulings, including those made in limine, are reviewed for abuse of discretion. [Citation.] An abuse of discretion is established only when there is a clear showing

the determination exceeded the bounds of all reason under the circumstances. [Citation.]" (*Colombo v. BRP US Inc.* (2014) 230 Cal.App.4th 1442, 1474–1475.) "Moreover, when two or more inferences can reasonably be deduced from the facts, the appellate court cannot substitute its decision for that of the trial court. [Citation.]" (*Ceja v. Dept. of Transportation* (2011) 201 Cal.App.4th 1475, 1481.)

"In any civil action alleging conduct which constitutes sexual harassment . . . opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff." (Evid. Code, § 1106, subd. (a); see *Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 462 (*Rieger*) ["'sexual conduct' includes all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity"].) The prohibition does not apply "to evidence of the plaintiff's sexual conduct with the alleged perpetrator." (Evid. Code, § 1106, subd. (b).) If the plaintiff introduces evidence relating to plaintiff's sexual conduct, the defendant may offer relevant evidence "limited specifically to the rebuttal of the evidence introduced by the plaintiff." (*Id.*, § 1106, subd. (d).)

Evidence Code section 1106 "shall not be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783." (Evid. Code, § 1106, subd. (e).) To do so, section 783 mandates the

filing of a written motion stating that the defendant has an offer of proof of relevant evidence (subdivision (a)), accompanied by an affidavit in which the offer of proof is stated (subdivision (b)), and followed by a hearing out of the presence of the jury (subdivision (c)).

In this case, the trial court properly granted the motion in limine to exclude evidence of Navarro's sexual conduct with persons other than the alleged harassers. The scope of the prohibition was clearly appropriate under *Rieger*, and the prohibition was mandated pursuant to section 1106, subdivision (a).

Defendants contend the trial court erred when it prohibited defense counsel from further questioning Vega about why she was "very upset" about Navarro's conduct with a male employee. The testimony concerned Vega's bias, which was undisputed. At no point did Navarro's counsel ask Vega about any "past sexual activities" which would open the door the issue of Navarro's sexual conduct. Given the significant potential for prejudicing the jury (*Knoettgen v. Superior Court* (1990) 224 Cal.App.3d 11, 14), the court acted well within its discretion in precluding elaboration under Evidence Code section 1106 and 352.

If defendants sought to introduce evidence of Navarro's sexual conduct with the male employee to undermine her credibility, they were required to proceed with a noticed motion under Evidence Code section 783. (See *Meeks v. Autozone, Inc.* (2018) 24 Cal.App.5th 855, 875.) Defendants failed to do so. Instead, they rely on out of state authority

discussing a plaintiff's credibility and past sexual conduct. To the extent the cases are at odds with Evidence Code section 1106, those cases "lack[] even persuasive value." (*Lucent Technologies, Inc. v. Board of Equalization* (2015) 241 Cal.App.4th 19, 35.)

Sufficiency of the Evidence on Navarro's Claims of Sexual Harassment

The jury found Nunez subjected Navarro to sexual harassment based on two theories of sexual harassment—hostile work environment and quid pro quo harassment. Defendants contend insufficient evidence supports the findings. We disagree.

A. *Standard of Review*

When, as here, a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) ""'In determining whether a judgment is supported by substantial evidence, we may not confine our consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court. [Citation.] We may not substitute our view of the correct findings for those of the trial court [or jury]; rather, we must accept any reasonable interpretation of the

evidence which supports the [factfinder's] decision.'" [Citations.]" (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 816.)

"'"Substantial evidence" is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.' (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) We do not . . . reassess the credibility of witnesses. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622.) We are 'not a second trier of fact.' (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.)" (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1246.)

B. *Statutory Scheme*

Section 12940 provides, in relevant part: "It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] . . . [¶] (j)(1) For an employer . . . or any other person, because of . . . sex, . . . to harass an employee, . . . Harassment of an employee, . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fail to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring."

"In reviewing sex based suits under FEHA, 'Courts have recognized two forms of sex-based workplace harassment, quid pro quo and hostile or abusive environment. [Citation.] The former consists, as the Latin phrase signifies, of unwelcome demands for sexual favors in return for advancement or other perquisites in the workplace. Sex-based hostile or abusive environmental claims, on the other hand, arise when 'the workplace is permeated with "discriminatory intimidation, ridicule, and insult' . . . that is "sufficiently severe *or* pervasive to alter the conditions of the victim's employment' . . . ." . . . [Citation.]' (*Birschtein v. New United Motor Manufacturing, Inc.* [(2001)] 92 Cal.App.4th [994,] 1000, fn. omitted.) However, the harassment need not be severe *and* pervasive in order to impose liability; either severe *or* pervasive will suffice. [Citation.]" (*Sheffield v. Los Angeles Cty. Dept of Soc. Servs.* (2003) 109 Cal.App.4th 153, 160–161.) "The determination 'is ordinarily one of fact' [citation]" (*Caldera v. Department of Corrections and Rehabilitation* (2018) 25 Cal.App.5th 31, 38 (*Caldera*)), and should be "judged on both an objective and subjective basis," requiring "evaluation 'of the social context in which particular behavior occurs and is experienced by its target . . . . [It] often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.' [Citation.]" (*Rieger*, *supra*, 104 Cal.App.4th at p. 459.) A plaintiff must show (1) she was subjected to unwelcome sexual advances,

conduct or comments; (2) the harassment was based on sex; and (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment. (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 (*Lewis*).)

By contrast, a cause of action for quid pro quo sexual harassment occurs "when submission to sexual conduct is made a condition of concrete employment benefits." (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1012, fn. 10; accord, *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 141 (*Mokler*).) Such conduct includes "sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414.)

C. *Analysis*

Substantial evidence supports the jury's finding that Nunez subjected Navarro to sexual harassment. The record establishes a pattern and frequency of physical contact and unwelcome advances by Nunez that is sufficiently pervasive to alter the conditions of employment.[3]

Shortly after Navarro began working at 4Earth, Nunez began a pattern of making objectionable contact with

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[3] Defendants do not appear to dispute that Navarro was subjected to unwelcome conduct and comments, all of which was based on sex.

Navarro, including caressing her hands, rubbing her back, and touching her shoulders. During those times, Navarro felt like Nunez "was taking [her] clothes off." The physical contact was seen by Navarro's coworkers, who also found the conduct inappropriate.

Nunez also made unwelcome advances toward Navarro and consistently stared at her at work. On one occasion, Nunez told Navarro that he like to look at her Facebook profile "in order to fall asleep." Nunez and other coworkers believed Nunez stared at Navarro in a "perverted" way as if he was undressing Navarro with his eyes. The unwanted physical contact and comments continued throughout 2013, when Navarro told Nunez to stop. Although Nunez stopped the unwelcome physical contact, he continued to leer at Navarro on a daily basis until he was terminated in 2014. These circumstances undoubtedly encompass more than "repeated acts of *staring* at a fellow worker," which alone may constitute harassment. (*Birschtein*, *supra*, 92 Cal.App.4th at p. 1001).

Defendants' cited case authorities do not lead to a contrary conclusion. In *Lewis*, *supra*, 224 Cal.App.4th 1519, an employee sued his former employer and supervisors for sexual harassment and retaliation. (*Id.* at p. 1522.) The trial court granted summary judgment, and the employee appealed, contending acts by his supervisor of showing pornography, telling risqué jokes, and inviting the employee over to his home constituted harassment. (*Id.* at p. 1527.) The court of appeal agreed, finding that repeated gift giving

and lunch purchases, alongside sexual jokes and showing pornographic images over a period of several months, supported an inference that the supervisor engaged in a pervasive pattern of conduct. (*Id.* at p. 1529.) In contrast, the court of appeal in *Mokler*, *supra*, 157 Cal.App.4th 121, found that three incidents over a five-week period did not constitute a pervasive pattern of conduct. (*Id.* at p. 144–145.) The court noted that the perpetrator did not supervise the plaintiff or work in the same building. (*Id.* at p. 145.) The incidents involved an "isolated but boorish comment on [plaintiff's] marital status," a "minor suggestive remark and nonsexual touching," and a single but brief physical touching of plaintiff's breast. (*Ibid.*)

Unlike *Mokler*, this case involves a far longer period of harassing conduct, and Nunez was Navarro's supervisor who worked in the same warehouse such that Navarro felt like she could not evade Nunez.

We also find *Hughes v. Pair* (2009) 46 Cal.4th 1035 (*Hughes*) and *Brennan v. Townsend & Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336 (*Brennan*), distinguishable. In *Hughes*, our Supreme Court held that although "an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a *physical* assault or the threat thereof,' . . . defendant's remark, which was made in the presence of other people attending a private showing at a museum, would not plausibly be construed by a reasonable trier of fact as a threat to commit a sexual assault on plaintiff." (*Hughes*, *supra*, at p. 1049.) There, a defendant made

suggestive comments during a telephone conversation, and later directed a sexually explicit message toward the plaintiff in front of the defendant's son and another minor. (*Id.* at p. 1040.) In *Brennan*, a majority of the appellate panel found the plaintiff did not show she was subjected to severe or pervasive harassment because the evidence at trial did not show "plaintiff was . . . ever . . . subjected to explicit language *directed at her or at anyone else in her presence*. [Citations.] Plaintiff was also never subjected to '*verbal abuse or harassment*.' [Citation.]" (*Brennan*, *supra*, at p. 1353.)

In this case, Nunez directed and specifically aimed unsavory contact toward Navarro, oftentimes in the presence of other employees in the workplace. Ultimately, the evidence presented at trial establishes that Navarro's supervisor created a workplace permeated with harassing conduct "far more severe and pervasive than the circumstances presented in the cases cited by [defendants]. [Citations.] The evidence established that [Navarro] found the conduct of [defendants] offensive. We conclude that a reasonable person would share that perception." (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1237.)

Because we conclude that sufficient evidence supports the jury's finding based on the theory of hostile work environment, we do not analyze Navarro's second theory of quid pro quo harassment. With respect to that theory, we note that the record evidence includes Nunez telling Navarro she could have "anything" she wanted if she went out with

him. Because Navarro's sexual harassment claim fully supports the compensatory damages for past economic non-economic losses, we need not decide whether her disability claim and failure to engage in the interactive process claim provide an alternative basis for affirming the judgment.[4]

Sufficiency of the Evidence on Punitive Damages

4Earth contends there is insufficient evidence for punitive damages. We disagree.

"As with compensatory damages, we review an award of punitive damages under the substantial evidence test. [Citations.] We consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference, and resolve evidentiary conflicts in support of the judgment."

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[4] Defendants separately contend the verdict was inconsistent because the jury found in favor of Navarro for the failure to engage in the interactive process, but against Navarro on the failure to make reasonable accommodations. The findings are not inconsistent. They involve distinct causes of action requiring proof of different facts (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424), including the availability of a timely accommodation. (See *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379.)

(*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 885.)

Civil Code section 3294, subdivision (a) provides for punitive damages where a defendant has been guilty of "oppression, fraud, or malice." "Malice" refers to "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights . . . of others." (*Id.*, § 3294, subd. (c)(2).) "Oppression" refers to "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Id.*, § 3294, subd. (c)(3).)

An employer shall not be liable for punitive damages unless it had advance knowledge of the employee's unfitness and employed him with a conscious disregard of the rights of others, or authorized or ratified the conduct for which the damages are awarded. (Civ. Code, § 3294, subd. (b).) "[T]he advance knowledge and conscious disregard . . . or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (*Ibid.*)

"[T]he term 'managing agent' [includes] only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566 (*White*).) "[A] managing [must] be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions

that ultimately determine corporate policy." (*Id.* at p. 573.) ""[T]he critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." [Citation.]' [Citation.]" (*Id.* at p. 574.) "The scope of a corporate employee's discretion and authority . . . is therefore a question of fact for decision on a case-by-case basis." (*Id.* at p. 566)

"[V]iewing all the facts in favor of the trial court judgment" (*White*, *supra*, 21 Cal.4th at p. 577), there was substantial evidence to support the finding that Nunez was a managing agent of 4Earth. Nunez was responsible for maintaining daily operations at the warehouse, and he exercised considerable authority in matters of training, team building, and discipline. His actions affected a substantial portion of the company, some of which came to the attention of the operations manager. (See *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 715 ["When we spoke in *White* about persons having 'discretionary authority over . . . corporate policy' [citation] we were referring to formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership."].) As warehouse manager, Nunez oversaw seven subordinate managers and approximately 100 employees. (See *White*, *supra*, at p. 577 [zone manager deemed a "managing agent" because she managed multiple stores, oversaw at least 65 employees and lower store managers, and exercised discretionary authority in other aspects of the business].) Nunez exercised a high degree of

discretion in the areas of training and disciplining employees, including Navarro, and in making decisions that could ultimately determine corporate policy.

DISPOSITION

The judgment is affirmed. Plaintiff and respondent Dominga Navarro shall recover her costs on appeal.

MOOR, J.

We concur:

RUBIN, P.J.

KIM, J.